

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JIRINA EMERSON	:	DETERMINATION
	:	DTA NO. 817153
for Revision of a Determination or for Refund of	:	
Mortgage Recording Tax under Article 11 of the	:	
Tax Law with Reference to an Instrument Recorded	:	
on February 27, 1998.	:	

Petitioner, Jirina Emerson, RD #6, 550 Route 164, Brewster, New York 10509, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to an instrument recorded on February 27, 1998.

On January 3, 2000 and January 7, 2000, respectively, petitioner, appearing *pro se*, and the Division of Taxation, by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), waived a hearing and agreed to submit this matter for a determination based on documents and briefs submitted by April 27, 2000, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether mortgage recording tax was properly payable on the maximum principal amount of a credit line mortgage where a portion of the proceeds of such mortgage loan were used to pay off a prior credit line mortgage on the same property.

FINDINGS OF FACT

1. On September 19, 1997, petitioner, Jirina Emerson, as mortgagor, executed a credit line mortgage in favor of Personal Mortgage Corporation, as mortgagee, on property located at 550 Route 164, Brewster, New York 10509 (“the first mortgage”). This first mortgage was given to secure a credit line of \$145,800.00. Petitioner executed a Credit Line Account Agreement with Personal Mortgage Corporation on the same date. The first mortgage was recorded in the office of the Putnam County Clerk on September 24, 1997 and, upon recording, petitioner paid \$1,433.00 in mortgage recording tax on the maximum credit line of \$145,800.00.

2. The first mortgage was assigned to Beneficial Mortgage Corporation on or about September 24, 1997.

3. On February 21, 1998, petitioner, as mortgagor, executed a second credit line mortgage in favor of Personal Mortgage Corporation on the same real property (“the second mortgage”). The second mortgage was given to secure a credit line of \$210,000.00. Petitioner executed a Credit Line Account Agreement with Personal Mortgage Corporation on the same date. Petitioner paid \$2,075.00 in mortgage recording tax upon the recording of the second mortgage in the Putnam County Clerk’s office on February 27, 1998. Petitioner paid mortgage recording tax on the maximum credit line of \$210,000.00.

4. The initial advance at the closing of the second mortgage on February 21, 1998 was \$174,384.49. \$147,400.49 of this advance was paid to Beneficial Mortgage Corporation to pay off the first mortgage.

5. The first mortgage was assigned account number 40835646 by Beneficial Mortgage Corporation. A Beneficial Mortgage statement dated February 24, 1998 indicates a principal

balance on this account of \$144,900.93. A Beneficial Mortgage statement dated March 24, 1998 indicates that the principal amount of this account was paid in full on February 26, 1998.

6. Petitioner's purpose in obtaining the second mortgage was to increase the line of credit available to her from \$145,800.00 to \$210,000.00. The mortgagee chose to accomplish this by paying off the first mortgage with a portion of the proceeds of the second mortgage.

7. The second mortgage contains a provision wherein petitioner represents and warrants that she owns the mortgaged property "free and clear of any rights of anyone else except the lien identified below." The first mortgage is not identified as a prior mortgage in the space provided. Nor is there any reference to the first mortgage in any other part of the second mortgage.

8. The first mortgage bears the identification "Loan ID: 0002174502." The second mortgage bears the identification "Loan ID: 0002451557."

9. Petitioner filed a claim for refund of \$1,433.00 in mortgage recording tax paid in connection with the first and second mortgages. Petitioner took the position that the \$145,800.00 mortgage was increased to \$210,000.00 and that mortgage recording tax should have been paid on the increased amount of the indebtedness only.

10. By letter dated March 3, 1999, the Division of Taxation ("Division") denied petitioner's refund claim. The Division took the position that the indebtedness secured by the first mortgage was satisfied and that therefore mortgage recording tax was properly paid on the full amount of the second mortgage.

SUMMARY OF PETITIONER'S POSITION

11. Petitioner contends that, pursuant to Tax Law § 253-b, mortgage recording tax on the second mortgage was properly imposed on the amount of the increase in the credit line from \$145,800.00 to \$210,000.00, and not on the maximum principal amount of the second mortgage.

Petitioner asserts that, notwithstanding that the transaction took the form of a payoff of the first mortgage and the issuance of the second mortgage in the greater amount, the transaction was, in substance, an increase in the maximum amount of petitioner's credit line mortgage and therefore, pursuant to Tax Law § 253-b, recording tax is properly payable on this increase only.

CONCLUSIONS OF LAW

A. Article 11 of the Tax Law imposes a tax on the recording of mortgages on real property located in the State of New York (*see*, Tax Law § 253[1]). The tax is imposed on the “*principal debt or obligation* which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within [New York State]” (*id.*; emphasis added). In the case of a credit line mortgage, such principal debt or obligation means “the maximum principal amount specified in such mortgage” (Tax Law § 253-b[1]). The tax under section 253 is imposed on the privilege of recording a mortgage; the underlying debt serves as the basis for computation (*see, Matter of Citibank v. State Tax Commn.*, 98 AD2d 929, 470 NYS2d 920, 922).

B. Tax Law § 253-b(1) also provides, in relevant part: “In the event the maximum principal amount of a credit line mortgage is increased, a tax is imposed as provided in . . . this article on such new or further indebtedness or obligation when the instrument evidencing such further indebtedness is recorded.”

C. The above-quoted provision is, by its terms, applicable where “the maximum principal amount of a credit line mortgage is increased.” In the instant matter, however, the maximum principal amount of the first mortgage was not increased. Instead, the loan secured by the first mortgage was paid in full with the proceeds from the second credit line on February 26, 1998, and the second mortgage was not recorded until February 27, 1998. The statute's use of the

singular and the present tense indicates that the continued existence of a credit line mortgage is a precondition to the application of this provision. The first mortgage debt and lien ceased to exist as of February 26, 1998. Accordingly, contrary to petitioner's assertion, the quoted provision is inapplicable to the instant matter and recording tax was properly due on the maximum principal amount specified in the second mortgage.

D. The second mortgage also fails to qualify for exemption from recording tax under Tax Law § 255. Specifically, Tax Law § 255(1)(a) provides that a mortgage is exempt from the recording tax if:

a supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, or an additional mortgage is recorded imposing the lien thereof upon property not originally covered by or not described in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage

E. As a general proposition, in order to avoid recording tax on the full amount of a second or supplemental mortgage, a taxpayer must show that "the parties to the transaction intended to continue and confirm the original debt, not cancel or extinguish it" (*Matter of Sunset Nursing Home, Inc.*, Tax Appeals Tribunal, October 26, 1989). No tax shall be incurred on the second mortgage "as long as the parties are careful not to extinguish the original debt so as not to create a new indebtedness" (*Matter of Bay View Towers Apts. v. State Tax Commn.*, 48 AD2d 86, 367 NYS2d 856, 860, *affd* 40 NY2d 856, 387 NYS2d 1002). As a threshold requirement for the exemption, the original mortgage must be in existence at the time of the recording of the subsequent one (*see, Matter of Citibank v. State Tax Commn., supra*, 470 NYS2d at 922).

F. In the instant matter, the evidence indicates that the parties extinguished the first mortgage debt and created a new indebtedness with the second mortgage. Specifically, as noted previously, the loan secured by the first mortgage was paid in full on February 26, 1998 with the proceeds from the second credit line, and the second mortgage was not recorded until February 27, 1998. Petitioner thus failed to meet the threshold requirement of the simultaneous existence of the two mortgages. Additionally, neither the second mortgage nor the second credit line account agreement provide for the continuation of the original indebtedness or lien. Indeed, neither of these documents make any reference to either the first loan or the first mortgage. Accordingly, notwithstanding that the second mortgage involved the same parties and mortgaged premises as the first, the second mortgage functioned as an independent instrument and was not a continuation of or supplement to the first mortgage (*see, Matter of Sunset Nursing Home, Inc., supra*) .

G. As to petitioner's contention that the substance of a transaction should be determinative of its taxability under Article 11, it is well established that mortgage recording tax law places great weight on the form of the transaction (*see, Matter of Long Island Lighting Company*, Tax Appeals Tribunal, March 23, 1995). That is, if a transaction is entered into in a form which falls within the statute, then it is taxable (*Sverdlow v. Bates*, 283 App Div 487, 129 NYS2d 88, 91). The construction accorded Tax Law § 253-b herein is consistent with this well-established rule. As discussed previously, the form of the transaction in this case properly resulted in the imposition of mortgage recording tax on the maximum credit line amount of the second mortgage.

H. The petition of Jirina Emerson is denied and the Division of Taxation's denial of petitioner's refund claim, dated March 3, 1999, is sustained.

DATED: Troy, New York
August 3, 2000

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE